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In The

Supreme Court of the United States

October Term, 1974

No. 75-45

CLIFTON C. TANG, and
AFFY INDUSTRIES, INC., *Petitioners,*

vs.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CLIFTON C. TANG,
228 E. Clinton Avenue,
Tenafly, N.J. 07670

Counsel for Petitioners

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AFFY INDUSTRIES, INC., *Petitioners,*

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WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered on April 15, 1975.

OPINIONS BELOW

The Court of Appeals for the Third Circuit did not render an opinion. The opinions of the District Court are reproduced in Appendices D, E, and H *infra*.

JURISDICTION

The judgment order appealed from was entered in the Court of Appeals for the Third Circuit on April 15, 1975. This petition is filed within 90 days thereof. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the senior district judge properly exercised the discretionary power vested by F.R.Civ.P. Rule 78 in validly extending petitioners' time for filing notices of appeal in accordance with F.R.A.P. Rule 4(a) on grounds of documented official acts of the District Court on July 11, 1973?

2. Whether in accordance with F.R.A.P. Rule 4(a), "any other party" with a separate and different appellate question may file a notice of appeal within 14 days of the filing of the first notice of appeal, regardless of his side or his pre-judgment posture?

RULES INVOLVED

Pertinent parts of the Rules involved herein are compiled in Appendix M *infra*. They include: F.R.A.P. Rule 4(a), F.R.Civ.P. Rules 6(d) and 78, and local N.J. District Court Rule 12.

STATEMENT OF THE CASE

Federal jurisdiction is based upon diversity of citizenship. Plaintiffs (appellants-petitioners) are citizens of New Jersey; defendants are not. Judgment in excess of jurisdictional amount, for Legal Fraud and Equitable Fraud, was entered on July 2, 1973 against all defendants and in favor of corporate plaintiff (hereafter, AFFY). The trial opinion held that although the individual plaintiff (hereafter, TANG) suffered damages, "no direct action against (the) defendants will be afforded him." (USCAR-2 p.A-44)

Through court-directed exchange of form of judgment, the trial judge and all counsel knew two particulars for which plaintiffs deemed the judgment incorrect. Within 4 days of the entry of the judgment, counsel for plaintiffs served and filed a Notice of Motion to amend Findings so that a more correct judgment might be rendered. (App. 1a)

Nine (9) days after the entry of the judgment, by official Notice dated and mailed on July 11, 1973, the District Court instructed counsel that:

"Your motion returnable August 13, 1973 before Judge Garth has been received and filed.

"Your motion will be placed on the Calendar for September 10, 1973.

"Plaintiffs' submissions due July 20th; defendant's submissions due August 3rd.

"Any departure from this disposition requires the Judge's approval." (R-111 Exhibit H; USCAR-2 p.A-20)

The submissions due dates were specified and set by the Judge. (App. 1b; 5g) Plaintiffs' counsel received the Notice on July 12th, 1973, the 10th day after the entry of the judgment. (App. 1g) He was in a position to meet a July 12th due date had it not been specified as due July 20th in the July 11th Notice. (App. 2g) In reliance of the Notice, being the documented official acts of the District Court, AFFY submitted its motion papers on the July 20th due date. TANG had no need to seek amendment of Findings as to him. TANG's cause of action was dismissed as a question of law which had been briefed.

While the trial judge was away on vacation, defendants' counsel *ex parte* solicited an acquiescence of the judge's law clerk and submitted his opposing motion brief later than the due date. (App. 2g-4g; USCAR-2 p. A-21) As a result, not until Friday, August 10th, the 39th day after the entry of the Judgment, did plaintiffs' counsel learn of defendants' attack on the timeliness of the pending motion to amend Findings. By then, a regular motion under local rule 12 (set forth in App. 2m) could no longer be heard before the expiration of maximum extended appeal time (per F.R.A.P. Rule 4(a), set forth in App. 1m). An expedited motion by way of *ex parte* application in accordance with F.R.Civ. P. Rule 6(d) and local Rule 12(A)(B) - as set forth in App. 1m and 2m - must be resorted to.

Thus, on Monday, August 13, 1973, plaintiffs' counsel applied under Rule 6(d) for an expedited motion for leave to file notice of appeal within extension of time. The date of the motion paper was left blank when submitted. (App. 2b)

The trial judge being still on vacation, show-cause under Rule 6(d) was duly heard by a senior district judge, Judge Augelli, in the trial judge's stead. At the time, defendants' counsel did not have an office, nor an associate counsel, in the forum District (N.J.).

With the assistance of the trial judge's law clerk, Judge Augelli verified the official acts of the trial judge and the court clerk, documented in the District Court Notice of July 11, 1973. (App. 5g) Judge Augelli then filled in the blank date of the motion and wrote out in longhand on page 2 thereof the following Order:

"Time to file notice of appeal in this matter is hereby extended to August 31, 1973. Motion granted for plaintiffs as above stated. /s/ Anthony T. Augelli, U.S.D.J. Dated: August 13, 1973" (App. 3b)

Defendants' counsel was then notified of the motion and order which he did not move to vacate, to reargue or to appeal thereform within 30 days. Instead, he acquiesced for several months until after the appeals had been duly docketed (at 73-1905 and 73-1936). In November 1973, he moved to dismiss the appeals and the Court of Appeals then remanded the causes to the District Court:

"to determine whether each of these appeals (73-1905 and 73-1936) may be considered as filed in accordance with Rule 4(a) of the F.R.A.P., and, ***." (App. 1c)

The remanded causes did not proceed before the senior district judge, Judge Augelli, who originally granted the Rule 4(a) extension of time to appeal and who was intimately familiar with the events and circumstances in August 1973. With no participation by Judge Augelli, a new district judge, Judge Biunno, decided the remanded matter on submissions exclusively. Judge Biunno ruled that Judge Augelli's August 13, 1973 order extending appeal time was void because it was made *ex parte*. (App. 3e) He "ordered that the existing notices of appeal not be considered as filed within the time permitted by F.R.A.P. Rule 4(a)." (App. 2e) And he denied all motions for relief in the Order entered in the docket on April 22, 1974. (App. 5e; 1e)

Within 10 days thereof, on April 30, 1974, plaintiffs filed a combination motion (1) for reconsideration of the April 22nd Order, (2) for amendment of findings, and (3) for recordation of Judge Augelli's findings when he extended the appeal time. (App. 1f) The April 30th combination motion was considered and then denied by the Order entered in the docket on June 5, 1974. (App. 1h)

Within 30 days thereof, on July 2, 1974, plaintiffs filed the notice of appeal (App. 1i). Well within 40 days thereof, on July 16, 1974, the appeal (74-1685) was docketed.

On appeal, the following issues were raised. They are noted here because they subsist in the questions presented herein.

1. By reason of the July 11, 1973 District Court Notice, given and relied upon within 10 days of the entry of the judgment, whether the "unique circumstances" line of cases should have been followed? "Unique circumstances" cases cited were: *Thompson* v. *I.N.S.*, 375 U.S. 384 (1964); *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964); and *Mottler* v. *J.A. Jones Construction Co.*, 447 F.2d 954 (7th Cir. 1971).

2. Old cases decided before 1966 were based on then F.R.Civ.P. Rule 73(a) which did not contain the motion-discretion wording now contained in F.R.A.P. Rule 4(a), namely: "*with such notice as the court shall deem appropriate.*" This wording parallels that in F.R.Civ.P. Rule 78, namely: "*but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.*" Must Rule 4(a) be construed and applied in pari materia with Rule 78? (USCAR-1 pp. 8-17)

The appeal (74-1685) was dismissed by judgment order without an opinion. (App. 1j) Petition for rehearing was denied because no panel judge had asked for a rehearing and regular active judges did not vote for rehearing in banc. (App. 1L)

TIMELINESS OF THE APPEAL

On the point of timeliness of the appeal, respondents made the following statement in their Brief below:

> "On the 22nd day of April 1974, the district court entered an order denying appellants an extension of time within which to note an appeal from the principal judgment entered below 2 July 1973. On 30 April 1974, appellants moved for reconsideration which was denied 5 June followed by their appeal of 2 July 1974. Because of the motion for reconsideration, the order of 22 April did not become final until entry, on 5 June, of the order denying reconsideration. Therefore, the appeal noted 2 July 1974 was timely and conferred jurisdiction."
> (Appellees' Brief, USCAR-3 at p.1)

The dates of the relevant events are in accord with docket entries (App. 2a). The documents involved are set forth in Appendices E, F, H, and I *infra.*

A motion for reconsideration made within 10 days of the entry of the order is a Rule 59 motion. *Gainey* v. *Brotherhood of R&S Clerks,* 303 F.2d 716, 718 (3rd Cir. 1962) Here, the motion is also a Rule 52(b) motion to amend findings. (App. 1f) It comes within F.R.A.P. Rule 4(a). On the record, this appeal (74-1685) was timely. (On the record in *Kingman & Co.* v. *Western Mfg. Co.*, 170 U.S. 675 (1898), this Court reversed the opinionless dismissal at 79 F 997.) Here, the dismissal was "after consideration of all contentions." (App. 1j)

REASONS FOR GRANTING CERTIORARI

1. The questions presented for certiorari are of institutional importance because they pertain to uniform construction and application of Federal Rules which govern all appellate procedures below. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112 (1964)

2. On the first question: the consequences of the acts of the District Court on July 11, 1973, there now exist conflicts of decisions: conflict with (a) this Court's decisions in *Thompson* and *Wolfsohn*, *supra*; and (b) their progenies in the 7th and 8th Circuits, *Mottler*, *supra* and *Fairway Center Corp.*, *infra*.

A case in point is *Fairway Center Corp.* v. *U.I.P. Corp.*, 491 F.2d 1092 (8th Cir. 1974). At 1093, the court held:

"Under the *Wolfsohn* rationale, the appellant's excusable neglect is due to the error of the District Court in granting an extension of time for a motion for a new trial and thereby misleading appellant as to the proper time in which to appeal. The situation here does not require an adversary hearing to determine excusable neglect, because the important fact to be considered is any error by the District Court in granting extensions of time. Of course, the District Court has this knowledge, since it involves its actions. An adversary hearing, therefore, would not be illuminating and would only serve as a waste of judicial and legal energies. We conclude that the granting of the appellant's extension of time to appeal due to excusable neglect without affording appellees notice and opportunity to be heard should not preclude appellant from arguing this appeal."

This decision is in direct conflict with *Plant Economy, Inc.* v. *Mirror Insulation Co.*, 308 F.2d 275 (3rd Cir. 1962) cited by Judge Biunno in voiding Judge Auggelli's *ex parte* order extending appeal time. (App. 3e) The judge who wrote the *Plant* opinion was the senior judge on the panel below.

CONCLUSION

This petition should be granted.

Respectfully submitted,

Clifton C. Tang,
228 E. Clinton Avenue,
Tenafly, N.J. 07670

Counsel for Petitioners

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RECORD NUMBER EXPLANATION

R-111 means document No. 111 of the District Court record which has been certified for use in the Court of Appeals proceedings. It can be re-certified to the Supreme Court when needed.

USCAR-2 means document No. 2 marked by the U. S. Court of Appeals, certified for use in Supreme Court proceedings. USCAR-2 p.A-46 means page A-46 of USCAR-2.

USCAR-(4-15-75) means the document pertaining to the docket entry of April 15, 1975 in the U.S. Court of Appeals. It can be certified to the Supreme Court when needed.

RELEVANT DOCKET ENTRIES

Date of Entry		Record Number
1973		
6-19	Trial Opinion	77
7- 2	Trial Judgment	78
7-11	Notice of Motion to amend Findings and Judgment, with certificate of service on 7-3-73; filed 7-6-73.	79
7-23	Motion to amend Findings and Judgment, with certificate of service; filed 7-20-73.	80
8-16	Motion for extension of time to file notice of appeal and Order extending time to 8-31-73 therefor; filed 8-13-73. Notice mailed.	81
8-28	Memo. Opinion and Order denying the motion to amend findings and judgment (R-79,80); filed 8-27-73. Notice mailed.	84
8-30	Notice of Appeal (AFFY) filed 8-29-73.	86
9-13	Notice of Appeal (TANG) filed 9-12-73.	87
10-12	Order extending time to 10-29-73 for filing and docketing record on appeal filed. Notice mailed.	88

10-19	Appeal No. 73-1905 (AFFY) docketed in U.S.C.A.	
10-29	Appeal No. 73-1936 (TANG) docketed in U.S.C.A.	
12- 5	Order of U.S.C.A. remanding for further proceedings; filed 11-30-73 in N.J.D.C.	89
1974		
2-22	Findings of Fact and Conclusions of Law on Remand pending appeal (without Order); filed 2-20-74.	92
4-22	Supplemental Memo. and Order denying leave to file appeals nunc pro tunc, etc.; filed 4-18-74. Notice mailed.	109
5- 1	Motion to reconsider the order entered on 4-22-74, to amend and to record findings, etc. with certificate of service; filed 4-30-74.	110
5- 1	Affidavit in support of Motion (R-110); filed 4-30-74.	111
6- 5	Letter Opinion and Order denying the 4-30-74 motion (R-110); filed 6-3-74. Notice mailed.	119
7-10	Notice of Appeal (from R-119 and R-109) filed 7-2-74.	128
7-16	Appeal No. 74-1685 docketed in U.S.C.A.	

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4-15 Judgment Order dismissing Appeal No. 74-1685.

5- 9 Order of U.S.C.A. granting leave to file petition for rehearing.

5-28 Order of U.S.C.A. denying petition for rehearing.

Record No. 81, USCAR-2 p.A-46 and p.A-22.
Entered in docket on August 16, 1973.

U. S. DISTRICT COURT, DISTRICT OF N. J.

Civil No. 530-67

TANG, et al. v. CRAVER, et al.

MOTION FOR LEAVE TO FILE
NOTICE OF APPEAL WITHIN
EXTENSION OF TIME (and ORDER)

Pursuant to General Rule 12A of this Court, counsel for plaintiffs hereby applies to the court for leave to file notice of appeal within the extension of time authorized by Rule 4(a) of the Federal Rules of Appellate Procedure. This motion is necessitated by the following sequence of events.

1. After entry of judgment on July 2, 1973, counsel for plaintiffs filed and served a Notice of Motion to amend findings and judgment, the next day.

2. On July 11th, by notice, the court directed that the motion be scheduled for hearing on September 10, 1973 and that plaintiffs' submissions are due July 20th; defendants' submissions due August 3rd.

3. Counsel for plaintiffs filed and served papers designated "Motion" and "Plaintiff's Motion Brief" on July 20th.

4. Counsel for defendants, ex parte, secured an extension until August 10th to file and serve his submissions.

5. In their Answering Brief, defendants argued that plaintiff's July 20th sub-

missions were "untimely" and therefore the court lacks jurisdiction even to consider the motion.

6. An untimely motion to amend does not stop the running of the time for filing a notice of appeal.

7. Counsel for plaintiffs knows of no controlling case precedent which is dispositive of the "timeliness" issue raised by the defendants on the facts of this case one way or the other.

8. As scheduled, the court will reach the "timeliness" issue only after plaintiff's motion is actually made (see General Rule 12C of this Court) on September 10, 1973.

9. Pursuant to F.R.A.P. Rule 4(a), upon a showing of excusable neglect, the court may extend the time for filing a notice of appeal tc August 31, 1973 only and not beyond.

10. Thus, by reason of counsel's reliance upon the July 20th due date specified by the court, plaintiff's substantive right to appeal is in danger of expiration under defendants' belated attack on timeliness grounds undermining the jurisdiction of this court "even to consider the motion."

Therefore, counsel for plaintiffs must expeditiously move the court for permission to file a notice of appeal on or before August 31, 1973.

/S/ Clifton C. Tang
Att'y for Plaintiffs

Dated: August 1973.

(After hearing in chambers, the Senior District Judge wrote-in "13" in the undated Motion, making it: August 13, 1973.)

(The Senior District Judge then wrote out in longhand the following Order:) (USCAR-2 p.A-22)

Time to file notice of appeal in this matter is hereby extended to August 31, 1973. Motion granted for plaintiffs as above stated.

/S/ Anthony T. Augelli, U.S.D.J.

Dated: August 13, 1973.

Record Number 89, USCAR-(11-29-73).
Entered in Court of Appeals docket on
November 29, 1973.
Entered in District Court docket on
December 5, 1973.

U. S. Court of Appeals, Third Circuit.

Nos. 73-1905 and 73-1936.

AFFY INDUSTRIES, INC., Appellant in 73-1905
CLIFTON C. TANG, Appellant in 73-1936.

v.

WILLIAM E. CRAVER, JR., et al.

AND NOW this 27th day of November, 1973 the Appellees have moved (1) to consolidate the appeals; (2) to dismiss the appeals for want of jurisdiction because untimely notices of appeals were filed; and (3) to dismiss or affirm the appeals as manifestly without merit, or in the alternative to grant the Appellees 30 days after the determination of these motions by Appellants within which to file their briefs, and this court having noted that there may not have been an appropriate motion by the Appellants in the District Court to file the appeals, nunc pro tunc beyond the 30-day period but within the 60-day period provided in Rule 4(a) F.R.A.P.;

IT IS HEREBY ORDERED AND ADJUDGED that these proceedings be remanded to the District Court to determine whether each of these appeals may be considered as filed in accordance with Rule 4(a) of the F.R.A.P., and, if appropriate, to

afford opportunity to each appellant to file a proper motion, nunc pro tunc, pursuant to Rule 4(a). The District Court shall make appropriate findings regarding these matters.

By the Court,

/s/ H. E. Kalodner, Circuit Judge.

Dated: November 29, 1973.

Record No. 92, USCAR-2 pp. A-37 et seq.
Entered in the docket on Feb. 22, 1974.

U. S. District Court, District of N. J.

Civil No. 530-67

TANG, et al. v. CRAVER, et al.,

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND PENDING APPEAL (WITHOUT ORDER)

Tang and Affy sued defendants for fraud. The claim was that defendants had induced the making of a franchise agreement on the basis of misleading misrepresentation about actual experience of other franchise holders.

Trial was without a jury. Judge Garth concluded that defendants' efforts to build an aluminum siding business into a franchise operation had been quite unsuccessful, and that they were well aware of the failures. The material submitted to Tang, and his assignee Affy, were quite obviously based upon the estimated activity levels needed to achieve success in the franchise operation, but were represented as actual experience which had not in fact occurred.

In assessing damages, the trial judge determined the out-of-pocket loss sustained, and denied punitive damages. In arriving at the assessment of damages, a fact finding was made that after the first year of operation, in which the out-of-pocket loss was $21,444, Affy had become aware of the facts and essentially ceased efforts to obtain business. He accordingly excluded from the damages the business expenses incurred thereafter as not

attributable to defendants' tortious conduct. The trial judge also limited the recovery to Affy on the ground that the loss was a single one, and that it had been restrained (sic) by Affy only. What ensued thereafter is best understood as a chronology: (All dates are in 1973)

June 15	Opinion filed, with findings of fact and conclusions of law.
June 25	Judgment for Affy filed.
July 2	Judgment for Affy docketed.
July 6	Notice of motion filed by Tang and Affy, returnable August 13, 1973, to amend judgment, but without particularity.
July 11	Clerk mails notice that August 13 is not a return date; sets motion on calendar for September 10, 1973; directs plaintiffs' submissions by July 20 and defendants' submissions by August 3.
July 12	Last day of 10 day period for filing motion to amend judgment under F.R.Civ.P. 52(b). Nothing filed.
July 20	Affy files motion to amend judgment, with particularity. No filing for Tang.
Aug. 1	Last day of 30 day period for notice of appeal. F.R.App.P. 4(a). None filed.
Aug. 13	Ex parte motion for leave to file notice of appeal within extension of time.
Aug. 13	Order extending time to appeal to August 31, 1973, endorsed at foot of motion, for both Affy and Tang.
Aug. 27	Opinion and order denying motion

Aug. 29	Notice of Appeal by Affy filed.
Aug. 31	Last day of 30 day extension for filing notice of appeal, allowed by Order of August 13, and last day permitted by F.R.App.P. 4(a).
Sept.12	Notice of Appeal by Tang filed.
Nov. 27	Remand by Court of Appeals for District Court to make specific findings.

The individual plaintiff, Clifton C. Tang, is a lawyer. He entered into the franchise for the aluminum siding business as a commercial enterprise. The corporate plaintiff, Affy, was organized by Tang to take over the franchise as assignee, presumably to limit his risk to capital investment in the corporation; the sole stockholders are Affy and his wife.

It has been said before that a lawyer who represents himself has a fool for a client; yet Tang handled not only the negotiations and contract for the franchise but the current litigation as well. The string of errors committed in the attempt to have the judgment amended under F.R. Civ.P. 52(b), and in the attempt to appeal from the judgment under F.R.App.P. 4(a), attests to the inherent wisdom of the maxim.

The remand from the Court of Appeals is to make a determination whether the two appeals may be considered as filed in accordance with F.R.App.P. 4(a); and, if appropriate, to afford each appellant an opportunity to file a proper motion for leave to appeal nunc pro tunc.

No doubt, some argument can be made that the Clerk's notice of July 11, 1973 led Tang to believe he still had time to

perfect his motion, and that it would not be heard until September 10, 1973. No doubt, Judge Augelli's order of August 13, 1973, extending time for appeal to August 31, can be said to have led Tang to believe he had that much more time.

However, nothing has been presented by way of fact information to explain why the July 6 notice of motion, which applied to both Tang and Affy, failed to meet the requirements of F.R.Civ.P. 7(b)(1) as to particularity. Nor has any fact information been presented to explain why the July 20 motion, which applied only to Affy, was filed 8 days after the deadline fixed by F.R.Civ.P. 52(b).

The order of August 13, 1973, extending time for appeal to August 31 should not have been entered without notice. There was ample time to give short notice. But that point aside, only the notice of appeal for Affy was filed during the extended period. The separate notice of appeal for Tang was not filed until September 12, 1973.

On the review of the record, it is clear that the notice of motion filed July 6 for both Tang and Affy was not effective to terminate the running of the 30 day period for filing notice of appeal, as provided by F.R.App.P. 4(a). It clearly failed to conform to the particularity requirement of F.R.Civ.P. 7(b). The later motion, filed July 20 for Affy only, was out of time by 8 days. No "motion" for Tang was ever filed.

The conclusion is that the attempts to amend and to appeal were ineffective as a matter of law.

Both Tang and Affy have filed current motions intended to support an order granting leave to appeal nunc pro tunc, on the basis of the two notices already filed. These have been considered as though it had been ruled appropriate to allow motions to that effect. To support such an order, there must be facts presented from which the court can reasonably make a finding of excusable neglect.

The factual materials presented are barren of anything to support such a finding. On the contrary, what they do disclose is a deliberate and calculated attempt to spin out the process of amendment and appeal to its outer limits. They show a conscious taking of risk, a known skating on thin ice, rather than excusable neglect.

Thus, the Tang and Affy "notice of motion" filed July 6 displays awareness that the presentation was inadequate. It promised both the motion papers and the brief "on time". The last day to get the motion in order was July 12, yet nothing was filed until July 20, 8 days late and then for Affy only.

Tang says that the clerk's notice of July 11 led him to believe he had until July 20 to make his submission, but this argument is not credible. The motion papers were being prepared on July 6, and were due on July 12. They would have had to be finished on July 11 if they were to be mailed that day or delivered on the morning of July 12. The clerk's notice

mailed July 11, even if received the same day, provides no ground for finding excusable neglect for the delay in filing of 8 more days when the papers were due on July 12 anyway.

When the papers were filed late, they related to Affy only, and not to Tang. No rational explanation for the omission is provided.

Tang also argues that his adversary was aware of two of the grounds for amendment from the exchange of correspondence and drafts before the judgment was signed. But this argument merely weakens the position, for if those existing papers embodied the essential particularity, copies of them could have been attached to and made part of the notice of motion of July 6.

When defendants responded to the motion brief, they raised the question of the untimeliness of the effort to amend the judgment. Paragraphs 5 and 6 of the ex parte motion of August 13 disclose Tang's awareness of that position, as well as of its legal effect on the time for filing notices of appeal.

At that point, Tang did make prompt application, for both himself and Affy, to secure an order extending time to appeal until August 31. But he did it ex parte when there was still ample time to give some kind of short notice. The ex parte motion runs 2 typed pages. It took some time, say a half-hour at least, to prepare and type. Even when the adversary is outside the State, as here, it is both unprofessional and improper to fail to give at least telephone notice at that point, before drafting the motion,

when decision is made that the motion will be filed. Under such emergency conditions, even out-of-state counsel can arrange by phone to have a local attorney appear. No circumstances upon which a finding of excusable neglect could be grounded have been presented in regard to the failure to give this minimal notice.

The sequence thereafter is also instructive. The void order of extension set August 31 as the deadline for filing notice of appeal for both Tang and Affy. The notice of appeal for Affy was not filed until August 29, two days after the trial judge's ruling on the untimely motion. The notice of appeal for Tang was not filed until September 12.

Tang's explanation is that he represented both himself, pro se, and the corporate plaintiff, Affy, and that it was his duty to serve his client first. He also contends that once Affy's notice was filed, he himself had another 14 days to file under F.R.App.P. 4(a). And he waited out the full 14 days.

This position cannot be accepted as a basis for finding excusable neglect. A notice of appeal is a simple instrument and its preparation to embrace two parties requires nothing more than the insertion of both names. Even if this were not so, it would hardly take another 14 days to prepare a second notice of appeal for the second party.

The 14 day provision is not intended to be a device for stretching out the appeal process. One of two parties, represented by the same attorney, and in

the same basic posture in relation to other parties, cannot use the 14 day provision. That provision is designed to prevent one side from filing an 11th hour appeal and slamming the courthouse door shut on the other side. It is not unusual for a party to be not entirely content with the outcome of a lawsuit, yet to be ready to accept it if the other side does not appeal. The fact that the courthouse door cannot be slammed shut by a last minute appeal has doubtless served to eliminate many trivial appeals.

But that objective of the rule cannot be converted into a device by which two parties on the same side can stretch out the appeal process by using separate filings 14 days apart.

In sum, the fact finding is that the information submitted convincingly shows that Tang's difficulties are due to a deliberate attempt to delay for the sake of delay alone. Leave to appeal nunc pro tunc should be denied.

February 19, 1974

/s/ Vincent P. Biunno, U.S.D.J.

Record No. 109, USCAR-2 p.A-23 et seq.
Entered in the docket on Apr. 22, 1974.

U. S. District Court, District of N. J.

Civil No. 530-67

TANG, et al. v. CRAVER, et al.

SUPPLEMENTAL MEMORANDUM AND ORDER

This court's findings of fact and conclusions of law dated February 19, 1974 were as the result of an order of remand from the Third Circuit Court of Appeals of November 27, 1973.

There had been a judgment at trial in favor of Affy but not in favor of Tang. Both Affy and Tang later filed separate notices of appeal; Affy on a claim that the compensatory damages awarded were too low, and that it was also entitled to punitive damages, and Tang on a claim that he, too, should have been allowed recovery.

After the notices were filed, motions were made before the Court of Appeals (1) to consolidate; (2) to dismiss the appeals for failure to appeal within time (jurisdiction); and (3) to dismiss or affirm as manifestly without merit.

The remand noted that there may not have been an appropriate motion in this court for leave to file the appeals nunc pro tunc after the 30-day period but before the 60-day period provided by F.R.App.P. 4(a).

The remand order itself remanded to this court for two purposes:

> ... to determine whether each of the two appeals may be considered as filed in accordance with F.R. App.P. 4(a); and
> if appropriate, to afford opportunity to Affy and Tang to file a proper motion nunc pro tunc pursuant to that rule.

The order closed with the direction that: "The District Court shall make appropriate findings regarding these matters."

In accordance with the order of remand, the court allowed Affy and Tang to submit moving papers for leave to appeal nunc pro tunc. On February 19, 1974, it made its Findings of Fact and Conclusions of Law both in respect to the effectiveness of the notices already filed and in respect to the requests for leave to file nunc pro tunc (appeal), and the file was again sent to the Court of Appeals.

Since the motions first mentioned were motions addressed to the Court of Appeals, this court refrained from entering any order based on the findings of fact and conclusions of law. It now appears that the intention of the order of remand was to authorize this court not only to undertake what it did, but also to enter a dispositive order thereon.

It is accordingly ORDERED that the existing notices of appeal not be considered as filed within the time permitted by A.R.App.P. 4(a), and that the motions for leave to file appeals nunc pro tunc within the time allowed by that rule be and the same hereby are denied.

After the findings of February 19,

1974 were made, Affy filed a motion (Feb. 25, 1974) to amend the findings and for reargument. Thereafter, Tang filed a motion (March 4, 1974) to amend the findings and for reargument. Finally, both Affy and Tang filed a motion (March 11, 1974) for an order reaffirming that Judge Augelli's ex parte order of August 13, 1973 be re-affirmed as not void. These several motions were accompanied by affidavits, exhibits and argument briefs. All have been duly considered.

One argument is that under U.S. v. Wheeler, 256 F.2d 745 (C.A.3d 1958), this court could not make the determination that Judge Augelli's order of August 13, 1973 was void. Several aspects are argued. One is that F.R.App.P. 4(a) allows an ex parte order by the use of the words "with such notice as the court shall deem appropriate." The argument is that this authorizes no notice at all on the motion. This argument cannot be sustained. The notes of the Advisory Committee on Appellate Rules observe that Rule 4(a) derives from former F.R.Civ.P. 73(a) without change of substance, and that in explicitly requiring a "motion on notice" for requests to extend time after expiration of the 30 days, the rule codifies the result reached in several cases, including Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (C.A.3d 1962), in view of the requirement of F.R.Civ.P. 6(b).

The phrase "with such notice as the court shall deem appropriate" is in the context of F.R.Civ.P. 6(d), which ordinarily requires a minimum of 5 days notice, but authorizes the court to set a shorter or longer period. Neither Rule 6(d) nor

the phrase relied on here authorizes notice of this motion to be dispensed with entirely. This would convert a motion on notice to an ex parte motion.

F.R.App.P. 4(a) is explicit in requiring that when the request for extension of time to appeal is made after 30 days have expired, it must be by motion on notice. It has no such requirement when the application is made before expiration. This is in accord with F.R.Civ.P. 6(b), which allows extension orders before expiration without motion or notice but which requires a motion (and notice by reason of F.R.Civ.P. 6(d)), when sought after expiration.

The second theme argued is that the "order" was on "notice" in that adverse parties were given notice of the entry of the order. This is a specious argument. The notice that the rule refers to is notice that the motion will be made, not notice that the order has been entered.

The third theme is that the findings dated February 19, 1974 amounted to an overruling of Judge Augelli's decision by his order of August 13, 1973, as disapproved by Wheeler. This argument is a misreading of Wheeler. All that the findings did was to make a determination that the order of August 13, 1973 was not legally effective to accomplish its purpose of extending the time for appeal. The term "void" is legal shorthand for that process and nothing more. Even if this court had entered the order of August 13, 1973 it would have been a "void" order. This is a legal consequence that the Court of appeals might have reached

itself had it decided the pending motions. When it remanded here, it obviously authorized to be done in that regard whatever it might have done for itself.

But all of this presentation and argument is beside the point, since both Affy and Tang were afforded an opportunity on motion and notice to seek an order allowing the filing of notices of appeal nunc pro tunc. That request was fully considered, and was denied on the merits.

Other arguments presented now add no further substance to the previous submissions. The handwritten evaluation by former Justice John J. Francis goes to the findings at the trial that Judge Garth made. Excerpts are set out indicating that from what Justice Francis was told (and we do not know what that was) he would have made different findings on damages and punitive damages. He also goes on to point out that different judges often arrive at different results when finding facts, and that Judge Garth is an excellent judge who does not reach results lightly; while he does not agree with the result, Justice Francis said "it seems unlikely that you will persuade him to increase your monetary award".

This entire matter relates to the probable success of the application to Judge Garth to make an amended order, and has nothing to do with the failure to file the motion papers by the required date.

On full reconsideration, the court finds no basis for any of the relief sought by the pending motions, and all of them are accordingly denied. SO ORDERED. April 16, 1974 /s/ Vincent P. Biunno, USDJ.

Record No. 110, USCAR-2 p.A-3.
Entered in the docket on May 1, 1974 showing Motion served and filed on April 30, 1974, within 10 days of the entry of the April 22, 1974 Order.

U. S. District Court, District of N. J.

Civil No. 530-67

TANG, et al. v. CRAVER, et al.

MOTION

Proceeding as heretofore without oral hearing, plaintiffs submit the following motions before the Honorable Vincent P. Biunno of this Court, with accompanying affidavit (dated 4-29-74) in lieu of motion brief:

(1) Motion for reconsideration of Judge Biunno's order docketed on April 22, 1974 on grounds of controlling law exemplified by Wolfsohn v. Hankin, 376 U.S. 203 (1964).

(2) Motion for amendment of Judge Biunno's Findings and Conclusions dated Feb. 19, 1974, on grounds of evidence presented both before and after Feb. 19, 1974, as particularized in the accompanying affidavit of 4-29-74.

(3) Motion for recording Judge Augelli's findings which constituted the substantive basis for his granting extension of appeal time on 8-13-73, on grounds particularized at pp. 4-7 of the accompanying affidavit of 4-29-74.

(Remainder omitted herein.)
(The accompanying affidavit, in pertinent part, begins on next page.)

Record No. 111, USCAR-2 p.A-4 et seq.
Entered in the docket on May 1, 1974.

U. S. District Court, District of N. J.

Civil No. 530-67

TANG, et al. v. CRAVER, et al.

AFFIDAVIT of plaintiffs' counsel accompanying the 4-30-74 Motion.

(In parts directly related to the issues on Petition for Certiorari)

5. The 2-19 Opinion, at p.3 line 28, stated that no fact information was presented to explain why Affy's motion was submitted on July 20th instead of July 12th, 1973. In fact, as a matter of record, the 7-11-73 Notice of the District Court (Exhibit H) explicitly instructed: (a) that the motion was calendared for hearing on 9-10-73, (b) that "Plaintiffs' submissions (are) due July 20th", and (c) "Any departure from this disposition requires the Judge's approval." A copy of said Court Notice was presented to Judge Biunno on 12-21-73 and my affidavit of 1-15-74 stated that I obtained information from the Deputy Clerk of the Court that the 7-11-73 Court Notice was authorized by the trial judge at the time, 7-11-73. After the 2-19 Opinion, my affidavit of 3-2-74 reiterated my brief of 12-21-73 that the trial judge set the July 20th submissions due date, that I received the Court Notice on 7-12-73, and that I relied on and complied with said due date. I believed that the finality of the judgment had been suspended by that

Court Notice pending the calendared hearing on 9-10-73. In response to Judge Biunno's comment, in the 2-19 Opinion at p.4 lines 21-29, my affidavit of 3-2-74 presented to Judge Biunno the circumstantial evidence of former-Justice John J. Francis' memorandum of 7-13-73 to show that I was in a position to meet a July 12th due date had it not been set as "due July 20th" in the 7-11-73 Court Notice. These constitute "fact information" presented to Judge Biunno before and after 2-19-74 which explain why Affy's motion was submitted on July 20th instead of July 12th, 1973. In short: the trial judge's instruction given in the 7-11-73 Court Notice.

6. The 2-19 Opinion, at p.3 line 33 and p.5 line 9, stated that there were ample time to give defendants' counsel telephone notice of the motion for extending appeal time. The 4-22 Order, at p.3 lines 4-20, further indicate Judge Biunno's unfamiliarity or oversight of the circumstances leading to and surrounding the 8-13-73 extension order of Judge Augelli. Therefore, I must detail the facts for the record. (Presented in my 12-21-73 brief.)

The Court Notice of 7-11-73 (Exhibit H) directed that "defendant's submissions (are) due August 3rd" and that "Any departure from this disposition requires the Judge's approval." In fact, however, defendants' submissions departed from the August 3rd due date under the following circumstances.

On 8-1-73, the trial judge was on vacation. Counsel for defendants, Mr.

Sussholz, telephoned the judge's law clerk, Mr. Robert Raymar on that day ex parte and secured Mr. Raymar's acquiescence to submit defendants' opposition brief on 8-10-73. (Exhibit I, Sussholz's letter to the judge) According to Mr. Raymar, he thought at the time that it was all-right because the judge would not be back until the last week of August anyway. According to Mr. Raymar, he did not realize nor informed by Mr. Sussholz that 8-1-73 was the 30th day after the entry of judgment - the last day to request an extension of appeal time without a motion and the last day to file a notice of appeal forthwith without an extension, under F.R.A.P. Rule 4(a).

Notwithstanding the judge-on-vacation circumstance and the unwitting acquiescence of Mr. Raymar, Mr. Sussholz sent me a copy of his letter, Exhibit I, which did not disclose the circumstances yet gave the impression that the judge had approved, through the law clerk, Mr. Sussholz's departure from the 8-3-73 due date. Mr. Sussholz elected not to telephone me on 8-1-73 after his phone call to Mr. Raymar, under these circumstances, for the purpose of either (a) to work out a stipulation for his overdue submission without prejudice by disclosing to me the substance of his submission, or (b) to fully disclose the circumstances of his securing Mr. Raymar's acquiescence, including his not informing Mr. Raymar 8-1-73 being the last day to file notice of appeal without extension, besides the judge's being on vacation.

As a result of Mr. Sussholz's non-

disclosure, Mr. Raymar innocently acquiesced and plaintiffs unawaredly lost their last opportunity to file notice of appeal without extension of time. I shall refer to the foregoing circumstances as the "unique circumstances of double concealment on 8-1-73."

As a consequence of Mr. Sussholz's double concealment on 8-1-73, not until Friday 8-10-73, did I learn of his attacking the pending motion to amend as untimely. That was 39 days after the entry of judgment and 21 days before the expiration of maximum extension of time for appeal.

Over the weekend, I researched the law - as I must - and I found no law prescribing "telephone notice" (stated in the 2-19 Opinion at p.5 line 6) for the F.R.A.P. Rule 4(a) motion. Since I could not predict what kind of notice "as the court shall deem appropriate" under the circumstances, during the weekend I prepared the motion papers with the motion date blank. I prepared one original for the court and three carbon copies, one copy for each counsel and one copy as spare.

Under F.R.Civ.P. Rule 6(d), a court order for short motion notice "may for cause shown be made on ex parte application." In order to ascertain what kind of notice "as the court shall deem appropriate", I must show cause on ex parte application.

First thing Monday, 8-13-73, at the courthouse, I learned from Mr. Raymar that the trial judge had been on vacation before 8-1-73. The Court Clerk's office referred the matter to Judge Augelli to act in the trial judge's stead.

I presented to Judge Augelli's law clerk - for him to relay to the Judge -, (a) "the unique circumstances of double concealment on 8-1-73" by Mr. Sussholz, and (b) the cause for expeditious action: 18 days before the expiration of maximum extension of time for appeal. I left the undated motion original and all three carbon copies with the law clerk. He asked me to come back in the afternoon.

When Judge Augelli received me in his chamber, he was assisted by the law clerk whom I spoke to earlier and by the trial judge's law clerk, Mr. Henry Field who followed the case. Apart from ascertaining the circumstances and recent history of the case, Judge Augelli asked me questions and he examined relevant documents in making the specific determination that plaintiff's submissions were in reliance and compliance of the July 20th due date instructed in the Court Notice of 7-11-73. I do recall his cognizance of said submission due dates being set by the trial judge. (Subsequently, I further verified this fact with the Deputy Clerk of the Court as I so stated in my affidavit of 3-2-74.)

After he completed his questions and examinations, Judge Augelli filled in the blank date of the motion original - "as the court shall deem appropriate" - making it: "Dated: August 13, 1973." (Judge Biunno can readily determine that the date "13" on page 2 of the motion original in the court record is Judge Augelli's handwriting.) The Judge then went on to write down in longhand his order extending appeal time to 8-31-73 and dated it "August 13, 1973" all on page 2 of the motion original.

Therefore, within a matter of a few minutes in the Judge's chamber, the motion date was set and the order was signed on 8-13-73. I relied on Judge Augelli's order. He was empowered, explicitly by the Supreme Court pursuant to Statute, under F.R.Civ.P. Rule 78:

> "***; but the (district) judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions."

I vividly recall a part of our conversation on that occasion that he said: "All civil actions are governed by Rule 1 - that speedy and inexpensive justice is done."

Mr. Field then took me to the Court Clerk's office where he used carbon paper to copy over the Judge's order onto the three copies which I supplied. He returned to me only one copy for the reason that the court needed one copy for defendants' counsel and another copy for the Court of Appeals.

On the basis of my knowledge and information, I believe that Judge Augelli made unrecorded findings and conclusions before he wrote his extension order which could have been upon one or more of the following substantive basis:

(A) By virtue of the exchange of Exhibits A,B,C,D,&E, when the 7-3-73 Notice of Motion to amend was served and filed, defendants' counsel and the trial judge <u>in fact knew</u> two of the grounds for the motion to amend with <u>particularity</u>. Therefore, there was no

prejudice to defendants (by neglecting to attach said Exhibits to the Notice of Motion, as Judge Biunno would require). Furthermore, within 10 days of entry of judgment, the District Court set the motion down for hearing on 9-10-73 and the trial judge set the submissions due dates. (Exhibit H) Therefore, in fact and in law, the trial judge had suspended the finality of the judgment, pending the outcome of the calendared 9-10-73 hearing. The suspension of finality with no prejudice to the defendants, stopped the running of the appeal time. Therefore, Judge Augelli was acting within the initial 30-day period and he found the neglect to attach the Exhibits excusable -being a technicality in form and not in substance because parties had just exchanged those Exhibits and in fact knew two particularities.

(B) Judge Augelli recognized that "unique circumstances" could be the basis for granting extension of appeal time, within the second 30-day period. 4 Wright & Miller, Federal Practice and Procedure (1973) Sec. 1168; 9 Moore's Federal Practice (1973) Sec. 204.02(1) last paragraph at p.907; and cases cited in these treatises. He considered "the unique circumstances of double concealment on 8-1-73" by defendants' counsel as unconscienable act calling for his granting the extension because injustice would otherwise result.

(C) Judge Augelli did make the specific determination that plaintiff's submissions were in reliance of and compliance with the trial judge instructed submissions due date. Such was the "unique

circumstance" in Eady v. Foerder, 381 F.2d 980 (7th Cir. 1967). Therefore, the time for appeal should be extended.

From the 4-22 Order, I discern that Judge Biunno is not at all familiar with the circumstances on 8-1-73 and on 8-13-73 known to Judge Augelli, in part first hand. Therefore, I believe and I request that Judge Biunno should make the finding of the all-important fact, in the interests of justice, namely: the substantive basis upon which Judge Augelli made his extension order of 8-13-73. (This is independant of any procedural ground for voiding Judge Augelli's order.)

(Subscription and attestation omitted herein.)

Record No. 119, USCAR-2 p.A-2.
Entered in the docket on June 5, 1974.

U. S. District Court, District of N. J.

Civil No. 530-67

TANG, et al. v. CRAVER, et al.

LETTER OPINION AND ORDER

On February 20[1], 1974, this Court filed a memorandum dealing with the post-judgment procedural history of this action. Plaintiffs thereafter filed a motion for reargument (General Rule 12I). On April 18, 1974 a supplemental memorandum and order[2] denying the timeliness of those notices of appeal[3] previously filed and denying leave to appeal nunc pro tunc was filed. From that order[2] plaintiff has again filed a motion[4] for reconsideration.

The Court has carefully reviewed the record and considered the motions filed on April 30, 1974 and finds no merit warranting modification or further explanation of its prior findings and disposition.

It is therefore, ORDERED that plaintiffs' April 30 motions are denied.

May 31, 1974 /s/Vincent P. Biunno, USDJ.

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1 (App. D supra)

2 (App. E supra, entered in the docket on April 22, 1974.)

3 (Resulting in Appeals 73-1905 and 73-1936)

4 (App. F supra, filed April 30, 1974)

Record No. 128.
Entered in the docket on July 10, 1974 showing the filing thereof on July 2, 1974, within 30 days of the final disposition of the orders appealed from on June 5, 1974.

U.S. District Court, District of N.J.

Civil No. 530-67

TANG et al. v. CRAVER, et al.

NOTICE OF APPEAL

Notice is hereby given that plaintiffs hereby appeal to the United States Court of Appeals for the Third Circuit from the "Letter Opinion and Order" entered in this action on June 5, 1974 and the "Supplemental Memorandum and Order" entered in this action on April 22, 1974, as reconsidered and subsisted in the said "Letter Opinion and Order."

Dated: July 2, 1974

/s/ Clifton C. Tang
Attorney for
Plaintiffs
(Address and Phone
omitted herein.)

Record No. USCAR-(4-15-75)
Entered in the docket on April 15, 1975.

U. S. Court of Appeals for the Third Circuit

No. 74-1685

CLIFTON C. TANG and
AFFY INDUSTRIES, INC., Appellants
v.
WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC. and CRAVALUME, INC.

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, and finding that this appeal was not timely[1],

It is ADJUDGED AND ORDERED that the appeal be and is hereby dismissed.

Costs taxed against appellants.

BY THE COURT:-
/s/ Van Dusen, Circuit Judge

Dated: April 15, 1975

Attest:
/s/ Thomas F. Quinn, Clerk

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1. See Findings of Fact and Conclusions of Law on Remand Pending Appeal (R-92, Appendix D herein); Supplemental Memorandum and Order (R-109, Appendix E herein); Letter Opinion and Order (R-119, Appendix H herein). The judgment (R-78) was entered on July 2, 1973.

Record No. USCAR-(5-9-75)
Entered in the docket on May 9, 1975.

U.S. Court of Appeals for the Third Circuit

No. 74-1685

CLIFTON C. TANG, and
AFFY INDUSTRIES, INC., Appellants,

vs.

WILLIAM E. CRAVER, JR., et al.

(The Clerk of the court presented Appellants' "Motion for Rule 40 Order," treated as motion for leave to file petition for rehearing out of time on April 30, 1975, one day later than the due date.)

The foregoing Motion is granted.

By the Court,

/s/ Van Dusen, Judge

Dated: May 9, 1975

Record No. USCAR-(5-28-75)
Entered in the docket on May 28, 1975.

U. S. Court of Appeals for the Third Circuit

No. 74-1685

CLIFTON C. TANG, and
AFFY INDUSTRIES, INC., Appellants

v.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Van Dusen, Judge

Dated: May 28, 1975

Compilation of Rules Involved Herein

Federal Rules of Appellate Procedure

F.R.A.P. Rule 4(a) provides, in pertinent part: "In a civil case *** in which an appeal is permitted by law *** the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of entry of the judgment or order appealed from; *** . If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires. *** Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

Federal Rules of Civil Procedure

F.R.Civ.P. Rule 6(d) provides, in pertinent part: " A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by

these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

F.R.Civ.P. Rule 78 provides in pertinent part: " Unless local conditions make it impracticable, each district court shall establish regular times and places, *** , at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions."

Local Rule of the N.J. District Court

Local Rule 12 provides in pertinent part: (A) Application for *** ex parte orders shall be made by leaving the proposed orders and supporting papers with the clerk, who shall deliver each application to the judge to whom the case has been assigned. (B) All applications for *** any other emergent relief may be made at any time to the judge to whom the case has been assigned. (C) All other applications by way of motions or otherwise shall be made on a regular argument day to the judge to whom the case has been assigned. *** No application will be heard unless the moving papers and a brief *** are received at the clerk's office at the place of allocation of the case at least 20 days prior to the date noticed for argument."

SUPREME COURT, U. S.

No. 75-45

FILED
JUL 22 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

CLIFTON C. TANG, and AFFY INDUSTRIES, INC.,
Petitioners,

v.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC.,

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

LEONARD B. SUSSHOLZ
100 S. Royal Street, Ste 3
Post Office Box 234
Alexandria, Virginia 22313
(703) 548-7400

Attorney for Respondents

THE CADILLAC PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-45

CLIFTON C. TANG, and AFFY INDUSTRIES, INC.,
Petitioners,

v.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

In lieu of opinion the Court of Appeals entered an explanatory judgment order (Pet. App. A, p. 1(j)) referred to in 513 F.2d 626. The three opinions of the district court (Pet. App. D, E, and H, pp. 1(d) - 5(e), and 1(h)) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1975. Rehearing by the panel and *en banc* was denied May 28, 1975. The petition for a writ of certiorari was filed on July 9, 1975. Jurisdiction of this Court is invoked under 28 *U.S.C.* 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly dismissed the appeal as untimely from the judgment entered July 2, 1973, and sustained the district court's denial on remand of an extension of time for filing the notices of appeal *nunc pro tunc* beyond the 30-day period but within the 60-day period provided in Rule 4(a) *F.R.A.P.*, upon detailed findings of fact and conclusions of law determining the neglect to appeal in time inexcusable.

STATEMENT

Petitioners sued respondents for damages; on July 2, 1973, judgment was entered awarding monetary damages to petitioner, Affy Industries, Inc., and dismissing the corresponding claim of petitioner Tang, assignor (Pet. App. A, 1(d) - 2(d)). More than 10 days afterward Affy filed a motion to amend the judgment; no time extension to file the motion was granted; no notice of appeal was filed within 30 days; an *ex parte* motion was filed and granted without findings to extend the time for an additional 30 days (Pet. App. A, 2(d) - 3(d); 1(b) - 3(b)). The Court of Appeals noting in a consolidated order that the *ex parte* motion may have been inappropriate, remanded for a Rule 4(a), *F.R.A.P.* determination and appropriate findings (Pet. App. A, 1(c) - 1(d)).

The district court found inexcusable neglect and denied a time extension (Pet. App. A, 1(d) - 5(e), 1(h)). In its judgment order the Court of Appeals expressly found that the (consolidated) appeal was not timely and referred to the district court's findings of fact and conclusions of law on remand pending appeal, the supplemental memorandum and order, and the letter opinion and order, *supra*, concerning the judgment of July 2, 1973 (Pet. App. A, 1(j)).

ARGUMENT

1. The Court of Appeals correctly ruled – in accord with every other Court of Appeals that has considered the question – that the circumstances shown by the findings of fact and conclusions of law do not amount to excusable neglect or compel a time extension. *Flint v. Howard*, 464 F.2d to 84 (C.A. 1, 1972), *reh. den.*, 464 F.2d 1087 (mere receipt of a tardy motion does not operate as an implied time extension); *Files v. Atty. of Rockford*, 440 F.2d 811 (C.A. 7, 1971); *cf. Maryland Casualty Co. v. Conner*, 382 F.2d 13 (C.A. 10, 1967) and *Buckley v. United States*, 382 F.2d 611 (C.A. 10, 1967), *cert. den.*, 390 U.S. 997 (1968) (under predecessor *F. R. Civ. Pro.* Rule 73(a) and F.R. Crim. Pro. Rule 37(a)(2), respectively); 9 Moore's *Federal Practice* ¶ 204.13 "Power of the District Court to Extend the Time for Appeal [1] – What Constitutes 'Excusable Neglect'" (2nd ed., 1973) pp. 267-274.

Nevertheless, petitioners rely upon the *Thompson-Wolfsohn-Mottler* rationale (Pet. pp. 6, 8).[1]

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[1] *Fairway Center Corp. v. U. I. P. Corp.*, 491 F.2d 1092 (C.A. 8, 1947) (Pet. p. 8), likewise involved the inapplicable situation where the court, within the time for appeal expressly granted an extension of time to file a motion for new trial.

Flint, supra, accurately distinguishes these from the case under review because here there was no extension granted by the court to file the late particularized motion to amend the judgment of July 2, 1973. In fact, the trial judge (later promoted to the Court of Appeals) expressly held the motion untimely (App. A to this brief). Petitioners took no appeal from this order of August 27, 1973 (Pet. App. A, p. 1(a)).

CONCLUSION

The petition for a writ of certiorari should be denied and double costs awarded respondents.

Respectfully submitted,

LEONARD B. SUSSHOLZ
100 S. Royal Street, Ste 3
Post Office Box 234
Alexandria, Virginia 22313
(703) 548-7400

Attorney for Respondents.

July, 1975.

APPENDIX A

United States District Court
DISTRICT OF NEW JERSEY
NEWARK, N.J. 07101

R. 110
CHAMBERS OF
LEONARD I. GARTH
JUDGE

August 27, 1973

MEMORANDUM OPINION AND ORDER

Clifton C. Tang, Esq.
228 East Clinton Avenue
Tenafly, New Jersey 07670

Leonard B. Sussholz, Esq.
923 Pennsylvania Building
Washington, D.C. 20004

Re: Tang, *et al. v.* Craver, *et al.*
Civil Action 530-67

Gentlemen:

I have reviewed all of the submissions with respect to plaintiffs' motion made returnable September 10, 1973. In light of the fact that I will not be holding a Motion Calendar on that date, and by reason of the prior filed opinion in this cause, I have found no necessity for hearing oral argument on the return date.

On July 6, 1973 the plaintiffs filed a "Notice of Motion" to amend findings of fact and conclusions of law. That Notice states: "Motion papers and motion brief are being prepared and they will be submitted on time in accordance with the Rules of the court." They were not. In fact, the actual motion was filed on July 20, 1973, some 18 days after the judgment had been entered on July 2, 1973.

F.R.C.P. Rule 52(b) requires that the instant type motion be made within 10 days after entry of judgment. This period cannot be enlarged F.R.C.P. Rule 6(b). The Notice filed on July 6, 1973 might under other circumstances have sufficed as the motion itself (see Rule 7(b)(1)) but the Notice, as filed, was without particularity. Moreover, it states on its face that "Motion papers will be submitted on time." I can only conclude that the instant motion was effectively made on July 20, 1973, – beyond the period of time permitted under Rule 52(b), and as such, must be dismissed as being out of time.

In any event I would deny the motion made by the plaintiffs on the merits, as I am not persuaded by any of the arguments made by the plaintiffs which deal with findings of fact and the conclusions of law.

Under these circumstances and for these reasons as well as for the reasons that were expressed in this Court's opinion filed June 15, 1973.

It is on this 27th day of August, 1973,

ORDERED, that the motion made by the plaintiffs to be returnable on September 10, 1973 be and the same is hereby denied.

The original of this Order shall be filed with the Clerk and constitute the Order disposing of this motion.

Very truly yours,

/s/ LEONARD I. GARTH
Leonard I. Garth
Judge, U.S. District Court

LIG: jer

Original Filed -
Clerk, U.S.D.C.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-45

CLIFTON C. TANG, and
AFFY INDUSTRIES, INC., *Petitioners,*

vs.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC., *Respondents.*

On Petition For a Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

REPLY MEMORANDUM

Clifton C. Tang,
228 E. Clinton Avenue,
Tenafly, N.J. 07670

Counsel for Petitioners

REPLY

This Petion follows the dismissal of the underlying appeal, 74-1685, which was taken from final orders entered in *1974* as specified in the Notice of Appeal (App. 1j). With this knowledge, respondents ***misrepresented*** the dismissed appeal as taken *"from the judgment entered July 2, 1973."* (Resp. Brief, "Question Presented") Docket entries (App. 1a-2a) show that two separate appeals were taken from the *1973* judgment, to wit: 73-1905 (AFFY) and 73-1936 (TANG). These two appeals have never been "consolidated" with each other or with 74-1685. With this knowledge, respondents ***misrepresented:*** *"the Court of Appeals expressly found that the (consolidated) appeal was not timely."* (Resp. Brief, p.3) In fact, however, no such *express finding* was ever made with respect to 73-1905 and 73-1936. Furthermore, docket entries show that these 1973 appeals were timely filed in accordance with Judge Augelli's extension order (App. 2p, *infra*) and the 14-day provision of F.R.A.P Rule 4 (App. 1m).

Judge Augelli made the aforesaid order in the (vacationing) trial judge's stead and he was at the time assisted by the trial judge's law clerk. (App. 5g) Judge Augelli knew then the action of the trial judge and the clerk partaking in the District Court Notice (App. 1n, *infra*) issued 9 days after judgment entry and 5 days after plaintiffs timely served and filed the Notice of Motion to amend findings. (App. 1a) The 9th day Court Notice regulated the submissions and hearing dates for the motion. It proximately caused plaintiffs' not filing notice of appeal within 30 days of judgment entry in order not to interfere with the court-regulated motion. Under circumstances recited in plaintiffs' protective motion, Judge Augelli made the order extending appeal time. (App. 1p-2p, *infra*) The order is valid pursuant to (a) discretionary power vested by current related Federal Rules cited at pages 2 and 6 of the Petition *sub judice* and (b) the reason articulated in the 8th Circuit *Fairway* case cited at page 8 of the Petition.

Before *Fairway* was reported, however, Judge Biunno decided

(App. 3e-4e) that Judge Augelli's order was "void," citing the 3rd Circuit *Plant* case.

On broad institutional basis, this Petition seeks this Court's (a) review of district judges' discretionary powers under current F.R.A.P Rule 4 in *pari materia* with F.R. Civ.P. Rule 78 and (b) resolution of the *Fairway-Plant* conflict — thereby vindicating Judge Augelli's extension order. It follows that jurisdiction over 73-1905 and 73-1936 remain *vested ab initio* in the court of appeals, not destroyed by Judge Biunno's voiding Judge Augelli's valid order. In view of *vested* appellate jurisdiction, Judge Biunno's other error [1] become moot and need not be dealt with on this Petition.

Respectfully submitted,

Clifton C. Tang,
228 E. Clinton Avenue
Tenafly, N.J. 07670

Counsel for Petitioners

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(1) For example, Judge Biunno, denied the motion for inclusion of Judge Augelli's 1973 knowledge in "findings" (App. 1f, part 3 and App. 1h, last para.) Judge Biunno elided the 9th day Court Notice in causing plaintiffs' deference thereto (i.e. not filing appeal while court regulated motion was pending) as distinguished from compliance therewith (i.e. submission on due date).

(2) Respondents' statement of the case lacked candor. For example, in this action for their fraud in franchising, they knew the forum law that tort claims were not assignable and therefore, not assigned; they knew that petitioners sued for rescission also. Their argument was made as if the 9th day Court Notice and Judge Augelli's order never took place.

Appendix N Facsimile of District Court Notice issued on the 9th day after judgment entry.
(R-111 Exh. H; USCAR-2 p.A-20)
Cross reference: Petition p.3.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N. J.

Date July 11, 1973

To: Clifton C. Tang, Esq.
228 E. Clinton Av.,
Tenafly, N.J. 07670
Re: Clifton C. Tang, et al vs William E. Cfaver, Jr., etal
Civil 530-67

Your motion returnable August 13 1973, before Judge Garth has been received and filed.

A. It will not be placed on the motion calendar for that date because of your failure to comply with Local Rule 12 of this Court in the following respects:

_____ No affidavit of mailing or acknowledgment of service;

_____ Papers not filed in the Clerk's Office 20 days prior to the return date;

_____ Motion not accompanied either by brief or by statement that brief is unnecessary and the reasons therefor;

__X__ The designated return day is not an argument day

B. In view of this default

__X__ Your motion will be placed on the calendar for September 10th 1973.

_____ After curing the default, it will be necessary for you to serve and file a notice of a new hearing date which may not be less than 20 days after the service of such notice.

Any departure from this disposition requires the Judge's approval.

Very truly yours,

Angelo V. Locascio
Clerk

cc: Leonard B. Sussholz, Esq.
Plaintiffs' submissions due July 20th; defendant's submissions due August 3rd.

Appendix P Facsimile of the Motion and Order extending appeal time
(R-81; USCAR-2 p.A-46, A-22)
Cross reference: Appendix B.

FILED

AUG 13 1973
AT 9:45 A.M.
ANGELO W. LOCASCIO
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CLIFTON C. TANG, and AFFY INDUSTRIES, INC., Plaintiffs,

v.

WILLIAM E. CRAVER, JR., et al., Defendants.

Civil Action
No. 530-67

MOTION FOR LEAVE TO FILE NOTICE OF APPEAL WITHIN EXTENSION OF TIME

Pursuant to General Rule 12A of this Court, counsel for plaintiffs hereby applies to the court for leave to file notice of appeal within the extension of time authorized by Rule 4(a) of the Federal Rules of Appellate Procedure. This motion is necessitated by the following sequence of events.

1. After entry of judgment on July 2, 1973, counsel for plaintiffs filed and served a Notice of Motion to amend findings and judgment, the next day.

2. On July 11th, by notice, the court directed that the motion be scheduled for hearing on September 10, 1973 and that plaintiffs' submissions are due July 20th; defendants' submissions due August 3rd.

3. Counsel for plaintiffs filed and served papers designated "Motion" and "Plaintiff's Motion Brief" on July 20th.

4. Counsel for defendants, ex parte, secured an extension until August 10th to file and serve his submissions.

5. In their Answering Brief, defendants argued that plaintiff's July 20th submissions were "untimely" and therefore the court lacks jurisdiction even to consider the motion.

6. An untimely motion to amend does not stop the running of the time for filing a notice of appeal.

7. Counsel for plaintiffs knows of no controlling case precedent which is dispositive of the "timeliness" issue raised by the defendants on the facts of this case one way or the other.

8. As scheduled, the court will reach the "timeliness" issue only after plaintiff's motion is actually made (see General Rule 12C of this Court) on September 10, 1973.

9. Pursuant to F.R.A.P. Rule 4(a), upon a showing of excusable neglect, the court may extend the time for filing a notice of appeal to August 31, 1973 only and not beyond.

10. Thus, by reason of counsel's reliance upon the July 20th due date specified by the court, plaintiff's substantive right to appeal is in danger of expiration under defendants' belated attack on timeliness grounds undermining the jurisdiction of this court "even to consider the motion".

Therefore, counsel for plaintiffs must expeditiously move the court for permission to file a notice of appeal on or before August 31, 1973.

Dated: August 13, 1973

Clifton C. Tang
CLIFTON C. TANG,
Attorney for Plaintiffs.

Time to file notice of appeal in this matter is hereby extended to August 31, 1973

Motion granted for plaintiffs as above stated.

Dated: August 13, 1973.

Anthony T Augelli
~~Edward J. Gurfein~~, U. S. D. J.

FILED
OCT 30 1975

In The

Supreme Court of the United States

October Term, 1975

No. 75-45

CLIFTON C. TANG, and
AFFY INDUSTRIES, INC., *Petitioners,*

vs.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC.,

Respondents.

On Petition For a Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

PETITION FOR REHEARING

Clifton C. Tang,
228 E. Clinton Avenue,
Tenafly, N.J. 07670

Counsel for Petitioners

PETITION FOR REHEARING

Petitioners respectfully move this Court for an order (1) vacating its denial of the petition for a writ of certiorari entered on October 6, 1975 and (2) reinstating in the court below Appeal No. 74-1685 for proceedings on the merits, consistent with due process of law. As ground for this motion, petitioners state the following.

1. Appeal No. 74-1685, dismissed below, was timely, according to the record.

Relevant facts of record show that the appeal dismissed below, No. 74-1685, was in fact timely. (App. 2a and 74-1685 docket sheets filed in this Court) Concisely, said appeal was taken from the district court order initially entered on April 22, 1974. (App. 1e) Within 10 days thereof, however, the motion for its reconsideration and for amendment of findings was filed and served. (App. 1f) Said motion was timely under F.R.Civ.P. Rules 59(e) and 52(b) and it stopped the running of time to appeal therefrom. F.R.A.P. Rule 4(a). The order denying the motion was entered on June 5, 1974

(App. 1h) thereby making the April 22nd order final and appealable. The notice of appeal therefrom was filed on July 2, 1974. (App. 1i) Being within 30 days as prescribed by F.R.A.P. Rule 4(a), the notice of appeal was timely and thereby it vested appellate jurisdiction. In transmitting the record and in docketing the appeal, the provisions of F.R.A.P. Rules 11 and 12 were complied with. (See 74-1685 docket sheet filed in this Court, entry dates of July 16, Aug. 13, and Sept. 9, of 1974.)

That the appeal, No. 74-1685, was timely and conferred appellate jurisdiction was expressly acknowledged in respondents' appellate brief below filed in this Court (Record item 3, p. 1).

2. The arbitrary dismissal of Appeal No. 74-1685 below denied due process of law.

Contrary to incontrovertible facts of record, the court below arbitrarily dismissed Appeal No. 74-1685, holding that "this appeal was not timely." (App. 1j; emphasis added.)

In S.E.C. v. Vance, Inc., 283 F2d 304, 305 (C.A.3 1960), the court below said that "This court ordinarily will dismiss an appeal only for want of jurisdiction." Accordingly, in Appeal No. 74-1685, the court below dismissed it without exercising jurisdiction.

As pointed out in petitioners' Reply Memorandum herein, respondents attempted to confuse this Court in misrepresenting the dismissed appeal to be two previous appeals, Nos. 73-1905 and 73-1936. Had it been so, the court below would have exercised its vested jurisdiction in No. 74-1685 and affirmed or reversed the district court instead of dismissing No. 74-1685 saying "this appeal was not timely." (Emphasis added.) In light of S.E.C. v. Vance, Inc., Id., the court below should have exercised jurisdiction but it did not. Therefore, it denied due process of law in Appeal No. 74-1685.

This unusual departure from due process was not previously presented to this Court because it could and would have been remedied if this Court had granted the petition for certiorari to review the

questions therein presented (i.e. Federal rules administration and inter-circuit conflict on rule-vested powers).

CONCLUSION

For the reasons set forth above, pursuant to Rule 19(1)(b), this Court's power of supervision is invoked to remedy the arbitrary denial of due process of law. Petitioners pray that Appeal No. 74-1685 be reinstated in the court below for usual proceedings on the merits.

Respectfully submitted,

Clifton C. Tang,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is confined to the grounds specified in Rule 58(2).

Clifton C. Tang

Clifton C. Tang

Dated: October 28, 1975